COURT COMPELS ARBITRATION BETWEEN ONE UNION AND THE EMPLOYER IN A JURISDICTIONAL DISPUTE

Carey v. Westinghouse Elec. Corp.
375 U.S. 261 (1964)

Petitioner union, the International Union of Electrical, Radio and Machine Workers (IUE), was certified by the National Labor Relations Board as the exclusive bargaining representative for all "production and maintenance employees" of respondent Westinghouse. A different union, the Federation of Westinghouse Independent Salaried Unions (Federation), had been certified as the exclusive bargaining representative for "all salaried, technical employees" of Westinghouse. Pursuant to a collective bargaining agreement with respondent, which provided for the arbitration of all unresolved disputes involving the "interpretation, application or claimed violation" of the agreement, the IUE filed a grievance asserting that certain employees represented by Federation were performing production and maintenance work. The employer, Westinghouse, refused to arbitrate on the ground that the dispute was a representational matter for the NLRB. IUE then petitioned the New York Supreme Court for an order compelling arbitration. The court refused, the Appellate Division affirmed,[1] as did the New York Court of Appeals, on the ground that the matter was within the exclusive jurisdiction of the NLRB.[2]

On certiorari, the United States Supreme Court reversed.[3] In an opinion by Mr. Justice Douglas, the Court held that whether the controversy was one over which of two unions should represent the employees in question (in which case the NLRB had jurisdiction) or was one over the assignment of work to the employees (in which case the NLRB would have no jurisdiction unless a strike were involved), arbitration would further the policies of the National Labor Relations Act. Justices Black and Clark dissented on the grounds that the entire matter should be decided by the NLRB instead of the arbiter, and that an arbitration award between the employer and only one union might prejudice the rights of the other union.[4]

The problem before the Court involved the effect to be given to an arbitration agreement when there is possible jurisdiction over the controversy by the NLRB. The case involved what the Court referred to as a "so-called jurisdictional dispute."[5] The Court felt a suit such as this could be one of two kinds: "(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another;

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[1] Carey v. Westinghouse Elec. Corp., 15 App. Div. 2d 7, 221 N.Y.S.2d 303 (1961).

[2] Carey v. Westinghouse Elec. Corp., 11 N.Y.2d 452, 230 N.Y.S.2d 703 (1962).

[3] Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

[4] See *id.* at 273.

[5] See *id.* at 263.

or (2) a controversy as to which union should represent the employees doing a particular work."[6] The Court did not decide whether this was a work assignment or representational dispute, but it must be kept in mind that different considerations are necessary, depending on which type of dispute is involved. If a work assignment dispute were involved, the NLRB would not have jurisdiction to deal with it, assuming the facts in the instant case. The National Labor Relations Act makes it an unfair labor practice for a union to strike to force an employer to assign work to a certain group of employees rather than to another.[7] In such a case the NLRB has authority to resolve the dispute,[8] but prior to a strike, the Board has no such authority. Therefore, the Court took the position that arbitration would provide a chance to resolve the dispute and avoid the necessity of a strike to bring the matter before the Board.

If, however, a representational dispute were involved, either the union or the employer might petition the Board to obtain a clarification of the union's certificate.[9] Therefore, the Court was squarely presented with the question of whether an issue within the jurisdiction of the Board could also be resolved through the arbitration provision of the collective bargaining agreement. A further complication, regardless of the type dispute involved, is introduced by the fact that an arbitration award where only IUE was

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[6] *Ibid.*

[7] 61 Stat. 141 (1947), as amended 29 U.S.C. § 158(b)(4)(i)(D) (Supp. V, 1959-63):

> It shall be an unfair labor practice for a labor organization or its agents—
> (4)(i) to engage in . . . a strike . . . [or other coercive measures] where . . . an object thereof is—
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . .

[8] 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1958) provides in part:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen. . . .

[9] For proper procedure to obtain a clarification, see Locomotive Firemen & Enginemen, 1964 CCH Lab. Cas. § 12. 895; 55 L.R.R.M. 1177 (1964). That decision also indicates the liberal policy of the Board in entertaining clarification proceedings. The Board states at 1178:

> [T]he Board, as a major custodian of the national labor policy, should take all positive action available to eliminate industrial strife and encourage collective bargaining. To this end the Board has often determined the placement of employees whose status is in dispute through the procedure of clarifying and modifying unit determinations when circumstances have changed.

See also Western Cartridge Co., 134 N.L.R.B. 67 (1961); Kennametal, Inc., 132 N.L.R.B. 194 (1961).

a party would still leave the rights of Federation in doubt. In holding that a remedy before the Board was not a bar to compelling arbitration of the dispute, the Court emphasized the possibility that such arbitration might end the dispute, and if it did not, the award would still have considerable weight if the dispute later came before the Board.[10] Mr. Justice Douglas observed: "If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one and the results are not repugnant to the Act." [11] The Court was quick to add, however, that the Board would not be bound by the arbiter's decision and should the Board disagree, its ruling would, of course, take precedence.[12]

In reaching its decision that the Board's jurisdiction was not "exclusive where a representational matter was involved," the Court placed a great deal of emphasis on *Smith v. Evening News Ass'n.*[13] In *Smith,* an employee sought damages from his employer for the alleged breach of a collective bargaining agreement between the employer and the employee's union. The agreement did not provide for the arbitration of grievances. The complaint stated that some employees belonging to a different union were on strike; because of this the employer refused to allow petitioner to report to work while nonunion employees were permitted to do so. If this complaint were true, there would have been an unfair labor practice with a remedy before the NLRB.[14] However, the Court held (with Mr. Justice Black dissenting) that this alternative remedy before the Board did not bar the individual employee from seeking a damage remedy in the courts. The Court in the instant case drew the analogy that if a remedy before the Board did not bar an employee from seeking damages in court, a remedy before the Board should not bar a union from seeking court aid in compelling arbitration pursuant to a collective bargaining agreement. It should be emphasized here that *Smith* was not direct authority for the holding in the instant case. There was no question of arbitration in *Smith.* Furthermore, the Board remedy in *Smith* involved discrimination by the employer, while in the principal case

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[10] The court quoted extensively both in the opinion and in the footnotes from the case of International Harvester Co., 138 N.L.R.B. 923 (1962). In that case, the Board indicated that it would give "hospitable acceptance to the arbitral process" in order "to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining."

[11] Carey v. Westinghouse Elec. Corp., *supra* note 3, at 270.

[12] For cases overruling the arbiter's decision, see Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955); Monsanto Chem. Corp., 97 N.L.R.B. 517 (1952).

[13] 371 U.S. 195 (1962).

[14] 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958) provides in part: "(a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." An unfair labor practice charge could have been filed under § 160 of the act, *supra* note 8, but that remedy was not pursued.

the remedy involved the administrative procedures before the Board for determining the proper bargaining unit in a representational dispute.

The holding in the instant case may be explained by the fact that arbitration has become firmly established as the "kingpin of federal labor policy." [15] A long line of cases has indicated that when the remedy of arbitration is available, it should be used.[16] Hence, even though arbitration may not be final and the award may be contrary to the interests of Federation, the Court followed this trend of favoring arbitration to resolve disputes.[17]

Several serious problems raised by the instant case are left unanswered. One of the major questions raised is what effect the decision will have upon the Board's position of assuming jurisdiction over such a dispute when arbitration is being sought or is in process. In this case, Westinghouse apparently protested arbitration because it did not want to be subjected to redundant proceedings before the arbiter and the Board[18] or to the risk of inconsistent awards under the two collective bargaining agreements. The Court replied that "the superior authority of the Board may be invoked at any time."[19] This seems to imply that the employer may still have the issue resolved with finality by the Board. However, this will depend on the position taken by the Board when the employer seeks to invoke its jurisdiction. Will the Board follow some of its previous decisions and refuse to exercise jurisdiction when the aggrieved party has not exhausted his arbitration remedy?[20] The Board should not follow this so-called "abstention doctrine"[21] in a case such as the instant one,

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15 Pfister, "Arbitration and the Supreme Court 1962 Spring Term," 4 Ariz. L. Rev. 200, 202 (1963).

16 See, *e.g.*, Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

17 For two excellent articles discussing this trend toward a favorable arbitration policy see, Pfister, "Arbitration and the Supreme Court 1962 Spring Term," *supra* note 15; Weiss, "Labor Arbitration and the 1961-1962 Supreme Court," 51 Geo. L. J. 284, 286 (1963).

18 Of course, under the facts of the principal case the problem of duplicative proceedings would be a real threat only if a dispute under § 9(c)(1) of the National Labor Relations Act, 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1958), were involved. If this were solely a work assignment dispute, absent a strike, there would not be a duplicative proceeding before the Board. If a true representational matter were involved, then a proceeding before the Board would be possible under § 9(c)(1) even though the issue had been submitted to arbitration.

19 Carey v. Westinghouse Elec. Corp., *supra* note 3, at 272.

20 See Pacific Tile & Porcelain Co., 137 N.L.R.B. 1358 (1962); United Tel. Co., 112 N.L.R.B. 779 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954).

21 For an excellent discussion of this "abstention doctrine" and illustrative cases, see Wollett, "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?," 10 Lab. L. J. 477 (1959).

especially since the Court has indicated that the Board's authority may be invoked at any time. Cases in which the Board has refused to take jurisdiction were those involving matters of contract interpretation where interpretation of the contract would resolve the unfair labor practice issue that was within the Board's jurisdiction or would avoid the necessity of facing such an issue.[22] Upon the facts presented by the instant case, where an arbitration proceeding will be binding on only two of three interested parties, it would be in the best interest of all concerned for the Board to assume jurisdiction when asked to do so and to render a final and binding decision upon all three parties. This, of course, assumes that a representational matter is involved and that the Board has jurisdiction to settle the issue by a clarification proceeding. If a work assignment dispute were involved, there would be no problem of whether the Board should assume jurisdiction, since absent a strike or other coercion it cannot do so. In such a case, the problem of inconsistent awards would be even more vexatious to Westinghouse because it could not invoke the Board's jurisdiction.

A corollary question presented here would be whether the effectiveness of the employer's remedy before the Board will depend upon the timeliness of invoking the Board's jurisdiction. In this case, Westinghouse had notice of the dispute, was asked to arbitrate, refused to do so, and was finally compelled to arbitrate by the Court. May Westinghouse now bring its case before the Board, more than two years after it was first informed of the dispute? Laches on the part of Westinghouse may persuade the Board to defer jurisdiction and to allow the dispute to go to arbitration. It appears that the safest policy for the employer to follow would be to petition the Board for a clarification of the certificate immediately upon being informed of the dispute or upon being asked to arbitrate.

Assuming there is no resort to the Board and that arbitration is compelled, a second major problem, raised by Mr. Justice Black in his dissent, is how to protect the rights of the employees belonging to Federation, the other union. Mr. Justice Black suggests that the rights of the employees of Federation would "be sacrificed by an arbitration award in proceedings between IUE and Westinghouse," and this would be "offensive to due process concepts."[23] Such an award would not be binding upon Federation, but "the weight of the arbitration award is likely to be considerable, if the Board is later required to rule on *phases of the same dispute.*"[24] In other words, if the result were unfavorable to Federation and Federation were to take its dispute before the Board (assuming a representational dispute), weight might be given to an arbitration award to which Federation was not a party. The rights of Federation would also be in jeopardy if a work assignment dispute were involved where Federation could not have the issue resolved by the Board, and would either have to accept the

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[22] *Id.* at 478, 482.

[23] Carey v. Westinghouse Elec. Corp., *supra* note 3, at 274.

[24] *Id.* at 271. (Emphasis added.)

award, begin another arbitration proceeding under its collective bargaining agreement, or call a strike in order to bring the problem before the Board.

Perhaps what the Court was doing here was adopting a hands-off policy since there was a possibility that the award would be favorable to Federation and that therefore Federation's rights would not be prejudiced. As the Court states, "arbitration may as a practical matter end the controversy."[25] Mr. Justice Harlan in his concurring opinion seems to indicate the Court's policy when he suggests that the choice is one between no arbitration at all and "one which at worst will expose those concerned to the hazard of duplicative proceedings."[26] The Court has previously followed a similar course, as is indicated by *Whitehouse v. Illinois Central R.R.*[27] In that case, a jurisdictional dispute arose, and the National Railroad Adjustment Board assumed jurisdiction over the employer and one of two unions. The employer, not wanting to resolve the dispute with only one union, sued in the courts for relief. The Supreme Court adopted a hands-off policy, saying that "Railroad's resort to the courts has preceded any award, and one may be rendered which could cause no possible injury to it."[28]

A possible solution to protect Federation would be to allow it to intervene in the arbitration proceeding between IUE and Westinghouse. In such a situation, Federation would be able to present its case and to attempt to secure a favorable award, the weight of which "is likely to be considerable if the Board is later required to rule"[29] on the dispute. Also, with all three interested parties in the arbitration proceeding, the chances are better that the arbitration would be of the "final and binding type" which the Court believes furthers the objectives of the Labor Management Relations Act. The problem is whether or not such intervention by Federation would be allowed. It would seem that the logical extension of the instant case should permit such intervention. The Court assumes by implication that some type of intervention is appropriate when it declares that "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute."[30] It is not clear whether this statement by the Court is authority for the proposition that intervention by the second union is permissible in the arbitration proceeding or merely authority that the union can intervene in the court proceeding. If the statement refers to intervention in the court proceeding the court should be able to compel tripartite arbitration in order to make the following arbitration effective.[31] If Federation is permitted to intervene, additional

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[25] *Id.* at 265.

[26] *Id.* at 273.

[27] 349 U.S. 366.

[28] *Id.* at 373.

[29] Carey v. Westinghouse Elec. Corp., *supra* note 3, at 271.

[30] *Id.* at 265.

[31] Local No. 1505 Int. Bhd. of Elec. Workers v. Local Lodge No. 1836, 304 F.2d 365 (1st Cir. 1962). In this case, the court indicated that intervention by the second union would be permissible. There were also involved here two unions and one employer. One union was seeking to compel the employer to arbitrate and the

problems will arise; *e.g.,* since Federation is allowed to intervene, will it be compelled to do so? If it chooses not to intervene after being invited to or notified of the arbitration hearing, will it be bound by the award upon some theory of waiver or estoppel? Such questions concerning intervention are novel ones, and will have to be resolved by future litigation or statutes.

It is unfortunate that the Court did not specifically decide whether this controversy was a work assignment dispute or a representational matter. If this were a work assignment dispute and only one union were involved, the decision would unquestionably be correct, since, absent a strike, no remedy is available before the Board. Arbitration would fill the gap and further the congressional policy of peaceful and rapid settling of labor disputes. However, since the Court says arbitration would also further labor law policy if a representational dispute were involved, the decision presents the problems outlined above. If the jurisdiction of the Board cannot be invoked at any time or if the rights of Federation cannot be protected, compelling an employer to arbitrate with only one of the two contesting unions would, as Mr. Justice Black stated, require that "the National Labor Relations Board, the agency created by Congress finally to settle labor disputes in the interest of industrial peace, . . . be supplanted in part by so-called arbitration which in its very nature cannot achieve a final adjustment of those disputes." [32]

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second union intervened in the suit, requesting that it be allowed to participate in the proposed arbitration. Although the case was disposed of on other grounds, the court stated that bilateral arbitration rather than tripartite arbitration would not make "arbitration the true instrument of industrial peace."

[32] Carey v. Westinghouse Elec. Corp., *supra* note 3, at 275.